RESTRICTIONS UPON THE USE OF LAND.

IN a country like this, in which towns are built up so rapidly, it is important that it should be clearly understood what power the present owner of a piece of land has to restrict the mode of use of the land in the future.

Many years ago the courts thought it wise to declare it to be against public policy to permit any man to control the devolution of the title to land for a longer period than a life or lives in being and twenty-one years after; but since that time courts of equity, by enforcing restrictive covenants as to the use of land, have permitted men to control, for an indefinite period after they are dead, the manner in which the land they owned in their lifetime might be used by succeeding generations.

Land now in the centre of the business part of London or New York is in some cases subject to restrictions placed upon it by men who, a hundred or three hundred years ago, thought best to lay it out for pleasure gardens or for building suburban residences. If the Duke of Bedford had not allowed his own land around Montagu House to be built upon, the land where the Elgin Marbles now stand in the British Museum might have been still restricted to the use of a gentleman's garden, as was provided in a deed to Mr. Montagu in 1685; and if Columbia College had not sold some of its lands on Sixth Avenue and Fiftieth Street for business purposes, a large tract in that neighborhood might still be of no use except for dwelling-houses.

There is a recent case in New Jersey[1] in which three acres of land near a populous village have been decreed to remain perpetually vacant, because the owner exacted a covenant from the purchaser that only one building, to be used for a dwelling-house with its appurtenances, should be erected on a plot of four acres, and the purchaser in an unguarded moment sold one acre on which the house provided for was afterwards built.

There has been a good deal of discussion during a few years past of the principles on which restrictive covenants are enforced against subsequent purchasers, and of the distinctions between covenants

[1] Coudert *v.* Sayre, 46 N. J. Eq. 386.

which bind only the parties and those which permanently affect the land of either party either by way of obligation or benefit. These principles and distinctions were the subject of a thoughtful article in this REVIEW in January, 1892, by Mr. Charles I. Giddings, and of another by Mr. Sherrerd Depue in the "American Law Register" for February, 1890. There is no need to go over again the ground so thoroughly worked in those discussions. Mr. Giddings, however, says: "The whole subject of restrictions is yet in its infancy;" and there is one part of it with respect to which he only suggests the principle to be applied in solving the questions that will arise. We refer to the questions which grow out of the sale of a plot of land with restrictions arising out of the adoption of a general scheme or plan for the improvement of the land. In such a case it is held that the purchaser of any lot has a right in equity to enforce the covenant against the purchaser of any other lot, even though there be no privity of estate or of contract between them, either directly or by assignment, express or implied. There have been some recent cases in England and in New Jersey on this branch of the subject. It may be interesting to refer to them and to consider how far the principles applied to the subject in general are sufficient to account for these decisions.

Mr. Giddings, in the beginning of his article, says: "A restriction may be defined as an agreement concerning the use of land by its owner which runs with the land in equity;" and Mr. Depue, in the title of his paper, calls the restrictions "equitable easements." Using the language of Bigelow, C. J., in a case in Massachusetts,[1] he defines an equitable easement as "A right, without profit, which the owner of land has acquired, by contract or estoppel, to restrict or regulate, for the benefit of his own property, the use and enjoyment of the land of another." Mr. Giddings rejects the analogy of easements, and insists that, as against the original covenantor, the remedy depends upon the doctrine of specific performance of a contract, and as against subsequent purchasers it depends on the doctrine of constructive trusts. As between the vendor and vendee who has agreed to the restrictions, if the agreement is one of which the court may decree specific performance, the court will enforce it by such a decree; and if the land has been sold to another with notice of the agreement, the court will enforce the agreement against him on the ground that he has taken the land subject to

[1] Whitney *v.* Union Ry. Co. (1858), 11 Gray (Mass.), 359.

the trust that was attached to it by his predecessor in the title. In either case this theory seems to imply that the remedy is given to the person with whom the contract was made, the person who has the right to ask for the specific performance of the agreements. If the existence of the right depends upon the right to specific performance, it would seem that it belonged only to the person to whom this right belonged.

The doctrine of specific performance would give the person with whom the contract was made a remedy against the person who made it, and the doctrine of constructive trusts would enable him to enforce it against a purchaser with notice; but it is not clear how either doctrine would be sufficient to give a remedy to any one else than the person with whom the contract was made, or serve to explain the cases in which several purchasers of different parts of a tract of land may enforce restrictive covenants against one another.

The fact that the right and the burden are treated as following the land into the hands of the assigns of both parties seems to suggest that the analogy of the easement is a true one.

The result of a restrictive covenant between land-owners is treated as an easement by Mr. Goddard in his treatise on Easements;[1] and in a recent case in Massachusetts,[2] cited by Mr. Depue in his article, the learned judge says: —

"If the seeming covenant is for a present enjoyment of a nature recognized by the law as capable of being conveyed and made an easement, — capable, that is to say, of being treated as a *jus in rem*, and not as merely the subject of a personal undertaking, — and if the deed discloses that the covenant is for the benefit of the adjoining land conveyed at the same time, the covenant must be construed as a grant, and, in the language of Plowden, 308, 'the phrase of speech amounts to the effect to vest a present property in you.' An easement 'will be created and attached' to the land conveyed, and will pass with it to assigns, whether mentioned in the grant or not."

Chief-Justice Bigelow, however, in an earlier case in Massachusetts,[3] placed the obligation on a purely equitable ground, and said: "An agreement restricting the use of land is binding on an assignee with notice, not because he is an assignee, but because he has taken the estate with notice of a valid agreement concerning it which he

[1] Goddard on Easements, p. 89.
[2] Norcross *v.* James (1885), 140 Mass. 188.
[3] Whitney *v.* Union Ry. Co., 11 Gray, 359.

cannot equitably refuse to perform." And Chief-Justice Beasley, in a leading case in New Jersey,[1] says: "The principle on which equity enforces the burden of a covenant against an alienee is that of preventing a party having acquired land with knowledge of the rights of another from defeating such rights, and not upon the idea that the engagements create easements which run with the land."

The idea of an equitable easement is certainly not sufficient to account for all the decisions, and, as Mr. Giddings points out, it involves an extension of the doctrine of easements to subjects to which they had never been applied by courts of law. The idea of a constructive trust seems to involve the holding of a title to the land for the benefit of another, and of an equitable title in the person for whose benefit it is held. It is something more than a restriction upon the manner in which the land may be used.

It would involve a discussion of all the cases from the beginning to determine what the governing principle really is. All we can attempt to do at this time is to consider the cases in which the principle has been applied to restrictions arising out of the adoption of a general plan for the use or improvement of the land, and to see in whose favor and against whom restrictive covenants in such cases may be enforced.

In these cases there are more parties involved than in the ordinary case of a covenant restricting the manner of use of a piece of land. All persons who purchase any part of the tract with reference to which the plan was made have an interest in having the restriction observed; a man who bought some years ago may have an interest in a covenant made with the purchaser who buys to-day, even though he cannot, of course, be in any way an assignee of the covenant; persons who made no agreement with one another are interested in enforcing a restriction that is common to all, and the original covenantee may have no interest in the contract which was made only with him. There is a new element in these cases which is not involved in the simpler case of a sale subject to a restrictive covenant. The question is not merely whether the land sold remains subject to the restriction in the hands of a purchaser, but also whether other lands sold, it may be before or afterwards, shall have the benefit and be subject to the burden of the restriction.

It is obvious that, in order to decide cases of this kind, it is not

[1] Brewer *v.* Marshall (1868), 19 N. J. Eq. 537.

enough to determine that the land in the hands of an assignee remains subject to the covenant made with the grantor. It may well be that the grantor has a right to enforce the covenant against an assignee of the land, and yet that no such right is acquired by a previous, or even a subsequent, purchaser of another part of the same land.

There is a long line of cases relating to restrictive covenants in which the only question is whether the person with whom such a covenant is made may enforce it against one who has taken the land with notice of the covenant; but there is nothing in these to suggest that any land other than that retained by the grantor shall have the benefit of the covenant. In these cases it will be found that the action is brought by the grantor or his assigns of the land retained, and the only question is whether the burden of the covenant runs with the land, or, to put it upon another principle, whether the purchaser with notice takes the land subject to the restriction. In the leading case of the Duke of Bedford *v.* The Trustees of the British Museum,[1] the injunction was asked for by the person with whom the covenant was made, and the question was whether it was binding upon the assigns of the person who made it, and if so, whether the former was not estopped by his own conduct from asking for an injunction. In Kippell *v.* Bailey[2] the suit was brought by the original grantor against a lessee of the grantee, and, not invoking the equitable principle afterwards applied, the court held that the covenant was not one which ran with the land, and was therefore not binding upon the assignees of the covenantor. In Tulk *v.* Moxhay,[3] the suit was brought by the grantor against a purchaser from the grantee, and Lord Chancellor Cottenham said: "The question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." The necessity for a covenant running with the land was rejected, and the equitable doctrine of notice was adopted; but the benefit was given to the person with whom the contract was made. In Clements *v.* Welles[4] the suit was brought by a lessor against an under-lessee upon a covenant not to carry on a particular trade. In Wilson *v.* Hart[5] the suit was brought by the grantor against a purchaser from the grantee on a

[1] 2 M. & K. 552 (1822).
[2] 2 M. & K. 517 (1834).
[3] 2 Phil. 774 (1848).
[4] L. R. 1 Eq. 199 (1865).
[5] 1 Ch. App. 463.

covenant not to use a house for the sale of beer, and the covenant was held to be personal, and not binding on the purchaser. In Cooke *v.* Chilcott[1] the bill was filed by the grantor against an alienee of the grantee to enforce a covenant to furnish a supply of water from a well. In McLean *v.* McKay,[2] there was a covenant between two that land should be left open, and the suit was brought by one against the alienee of the other. Richards *v.* Revitt [3] was a suit by a grantor against an assignee of the grantee with notice. Dietrichsen *v.* Cabburn [4] was a case of a negative covenant relating to personal property and the sale of patent medicines, and the complainant was the person with whom the covenant was made. In De Mattos *v.* Gibson,[5] the rule that a purchaser with notice of a contract relating to the use of property is bound by the contract, was applied to personal property, and the obligation was spoken of as an obligation to the person with whom the contract is made. So also Brewer *v.* Marshall,[6] the leading case in New Jersey, was a suit by a grantee of the covenantee against the vendor, on a covenant not to take and sell marl from the land he retained; and it was held that the covenant did not run with the land, and that the grantee was not entitled to the benefit of it. In Kirkpatrick *v.* Peshine,[7] the covenant sued on was made with the grantor by the grantors of the defendant who took with notice, and it was expressly agreed that neither the said grantors nor their assigns should erect any building beyond a certain line. The Chancellor said the covenant was made by the grantor for the benefit of the land which he retained, and that a *subsequent* grantee of those lands succeeded to his rights under the covenant. Whitney *v.* Union Railway Co.[8] is a case frequently cited in favor of the doctrine that a suit may be maintained in favor of any grantee of any part of the land; but it was only decided in that case that the original grantor might enforce the covenant against subsequent purchasers, and the rule, as stated, applied only to subsequent grantees of either. In Trustees of Columbia College *v.* Lynch [9] there were reciprocal covenants between the owners of adjoining tracts, binding themselves, their heirs and assigns, and it was held that one of the parties might maintain a bill for injunction against a grantee of the other; and the relation of the parties was the same in Trus-

[1] L. R. 3 Ch. Div. 694.
[2] L. R. 5 P. C. App. 327 (1873).
[3] L. R. 7 Ch. Div. 224 (1877).
[4] 2 Phil. 52.
[5] De G. & J. 276.
[6] 19 N. J. Eq. 537.
[7] 24 N. J. Eq. 206.
[8] 11 Gray, 359 (1858).
[9] 70 N. Y. 440 (1877).

tees of Columbia College *v.* Thacher,[1] in which the court refused relief because the circumstances had been so changed that the plan could not be carried out on both sides.

In all these cases the action was brought by the original covenantee, and the question was whether the restriction was binding upon a subsequent purchaser from the covenantor; and it was decided that such a covenant, touching the use of the land and purely restrictive in its character, would be enforced in equity against a subsequent purchaser with notice.

There are other cases in which the benefit of the principle is extended to subsequent grantees of the land for the benefit of which the covenant was made. It is easy to find a principle upon which a subsequent grantee may have the benefit of the covenant. If the covenant is one "touching and concerning the land," the benefit of the covenant runs with the land at common law, and the assignee of the freehold is entitled to sue for the breach of it.[2] Following the analogy of this rule of law, the Court of Chancery will enforce restrictive covenants or agreements in favor of a subsequent assignee of the land for the benefit of which the covenant was made.

It is not necessary to cite many cases on this point. In Coudert *v.* Sayre,[3] Vice-Chancellor Van Fleet, in declining to annul a restrictive covenant which change of circumstances had made very burdensome, said the covenant was made by the grantor for the benefit of the land that he retained, and a subsequent purchaser of that land succeeded to his rights under the covenant. And in Peck *v.* Conway,[4] where the action was brought by the subsequent grantee of a part of the lands retained, the court said that under the circumstances the covenant created an easement, or a servitude in the nature of an easement, for the benefit of the land retained, which passed to the grantee of that land.

It is not always true, however, that a grantee of the land retained has the right to enforce a restrictive covenant made by his grantor upon the sale of another part of the same land. The restrictive covenant may have been made for the personal benefit of the grantor, or it may have been made for the benefit of a particular piece of the land he retains. The mere fact that he is the owner of

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[1] 87 N. Y. 311 (1871).

[2] Spencer's Case, 3 Coke, 16, and the notes on this case in Smith's Leading Cases, * 68, 87, 175.

[3] 46 N. J. Eq. 386.

[4] 119 Mass. 546.

a tract of land of which he sells a part does not give the whole of that land the benefit of the covenant, so that the purchaser of any part of the land retained will be able to enforce it. If the covenant creates a legal easement in favor of the land the grantor retains, then the easement will go to the assigns of any part of the land, and the same will be true if the covenant is one which runs with the land at law. In either of these cases the legal right may be enforced by a court of equity; but if there is not a legal easement nor a covenant running with the land at law, then the question whether the subsequent grantee of a part of the land can have an injunction will depend on whether the restriction was intended to inure to the benefit of a purchaser of the land now sold. If it is, then, if it be a mere restrictive covenant, and the existence of it entered into the consideration of the sale to him, he may have the benefit of it in equity just as if it were an easement or a covenant running with the land at law.

In Keates *v.* Lyon[1] the owner of a tract of land sold one part of it, subject to a covenant on the part of the purchaser, his heirs and assigns, with the vendor and his executors and administrators, as to the buildings to be erected on the property purchased. He afterwards conveyed other parts of the same tract to various other persons, but it did not appear whether these conveyances contained the covenant or not. He afterwards bought back the lot first sold; and the question was whether he could then convey it free of the covenants. The court held that, without evidence that the subsequent purchasers bought with reference to the covenant, the benefit of it did not pass to them, and that the lot first sold might now be conveyed free of the covenant. In Master *v.* Hansard,[2] where a man had leased two parcels of his land subject to the same restrictive covenants, it was held that an assignee of the second lessee could not maintain a bill to restrain an assignee of the first lessee from violating the covenant, and the landlord from permitting him to do so. It was insisted that, as the landlord had a right to enforce the covenant, he should not be permitted to derogate from his own grant by permitting it to be violated; but the judges said that it would be extending this doctrine too far to compel him to take active measures to enforce the covenants he had made with another, and Lord Bramwell remarked that he considered the covenant as made for the benefit of the grantor's remaining property to allow him to

[1] L. R. 4 Ch. App. 218 (1869).

[2] 4 Ch. Div. 718 (1876).

make the most of it, and that the plaintiff was not entitled to the benefit of it. So also in Renals *v.* Cowlishaw,[1] where land was sold subject to restrictive covenants, with reference to the location and character of the buildings, and other parts were sold subject to the same covenants, and still another part was sold to the plaintiff subject to a somewhat different covenant, it was held that the plaintiff was not entitled to the benefit of the covenant. If it had appeared, the court said, that the deed contained references to the restrictive covenants already made by others, or it was shown in some other way that the covenants were a part of the subject-matter of the sale, the grantee might have the benefit of them ; but the mere fact that he was a grantee of part of the remaining land gave him no such right. The covenant might have been inserted, as it appeared to have been in this case, merely to enable the vendor to make the most of the property he retained. This decision was affirmed on appeal,[2] and was cited with approval in a later case in the House of Lords.[3]

It appears, therefore, that the mere sale of land subject to a restrictive covenant, while it creates a liability in equity against a subsequent purchaser of the land with notice, gives a remedy only to the original vendor or covenantee, and also under certain conditions to a subsequent purchaser from him of the whole or a part of the land retained. There is nothing in these cases to give a right to a prior purchaser from the vendor, nor to create a liability to one another of all the holders of any part of the land to which the restriction might apply. The principles on which these cases are decided do not go far enough to give a remedy to all the proprietors of a tract divided into lots and sold subject to restrictions in which the sales were made. The covenant, under the principle of these cases, would give a remedy only to those who had purchased of the grantor after the covenant sued on was made. A prior purchaser cannot be the assignee of a covenant not yet made by his grantor. He cannot acquire an easement not yet created, and if the vendor, having sold to him subject to a restriction, is at liberty to sell his remaining land as he pleases, then the prior purchaser has no interest in a covenant which afterwards happens to be made. The right of the prior purchaser must depend upon something else than the covenant itself. There must be some other agreement, express or implied, to give to purchasers generally a right to en-

[1] L. R. 9 Ch. Div. 125 (1878). [2] L. R. 11 Ch. Div. 866 (1879).
[3] Spicer *v.* Martin, L. R. 14 App. Cas. 12 (1888).

force restrictive covenants against one another without regard to the order of the conveyance.

Mr. Giddings, in his article in the HARVARD LAW REVIEW, suggests that the grantor can donate to the prior purchaser the benefit of the contract made upon a subsequent sale, because, he says, there is never any objection to making a contract for the benefit of another, and a restriction is only a contract. The donation, however, must be implied to support the theory; and even though there may be no objection to making a contract for the benefit of another, it by no means follows that the person for whose benefit a contract is made may maintain an action upon it either at law or in equity. It is well settled in England that a person not a party to a contract, that is, a person other than the one from whom the consideration moves, cannot maintain an action upon it at law;[1] and although it has been said in many cases in the United States that a person for whose benefit a contract is made may sue upon it, yet upon a careful examination it will be found that they are nearly all cases of money had and received, or cases in which an implied contract has arisen from the receipt of money from one person for the benefit of another, or those in which there has been something like a novation of contract.[2] At all events, the doctrine had never been so much as suggested in England when the first cases on restrictive covenants on the sale of land to several purchasers were decided, and the decisions must rest on some other ground.

There is a large class of cases in which it has been held that where lands are sold in parcels subject to a restrictive covenant or agreement, the purchaser of one lot may maintain a bill in equity to enforce the restriction against the purchaser of any other lot, and this without regard to the order of the purchases and without joining the original covenantee. It will be found on examination that these are all cases in which the land has been laid out and sold with reference to some general plan or scheme for the improvement of the whole property, and the various grantees have purchased with express or implied notice of this plan. It is the better opinion that as between the original vendor and the assigns of the vendee, the covenant is enforced on the principle that a person taking the land with notice of the covenant with respect to its

1 Tweddle *v.* Atkinson, 1 B. & S. 393.

2 See Joslin *v.* N. J. Car Spring Co., 36 N. J. L. 141; Crowell *v.* Hospital of St. Barnabas, 27 N. J. Eq. 650; Mellen *v.* Whipple, 1 Gray, 317; Leake on Contracts, 222; Article on Contracts for the Benefit of a Third Person, 4 N. J. L. J. 197 and 229.

use is bound in equity to observe the restrictions. The benefit of this is extended to subsequent purchasers of land for the benefit of which the restrictions were imposed, and they also take subject to the burden of them because of the added value given to their land by reason of the restriction upon the use of the other. When, therefore, there is a general scheme or plan for the improvement of the whole tract, it is the plan itself which is the subject of the notice, and which gives the added value to every part of the tract. Every one, therefore, who, with notice of the plan, takes any part of the tract to which it applies, takes subject to an obligation in equity to observe the restrictions imposed for the purpose of carrying the plan into effect for the common benefit; and since all the purchasers are interested in maintaining the scheme, the court of equity will aid any one of them in preventing any of the others from defeating it. One of the first cases in which relief was granted on the principle of carrying out a general plan was Whatman *v.* Gibson,[1] decided in England as early as 1838. In this case the owner of a piece of land divided it into lots for the building of a row of houses in a "crescent," according to a certain plan. A deed of covenant was made between the owner and two purchasers of lots and such others as should come in and sign the deed. The indenture referred to the plan and expressly declared that it should be a general and indispensable condition of the sale of all or any part of the land intended to form the row that the several proprietors for the time being should observe and abide by the stipulations and restrictions. The owner afterwards sold two other lots, and the purchasers signed the indenture and conveyed the lots, which afterwards came to the plaintiff and defendant respectively with at least constructive notice of the restrictions. Vice-Chancellor Shadwell, referring to the indenture, said it seemed to him that the matter was to be considered in equity not merely with reference to the form in which the covenants are expressed, but also with reference to what is contained in the preliminary part of the deed; namely, that it had been determined and made an indispensable condition of the sale of all and every part of the property that the several proprietors should observe the stipulations. It was quite clear, he said, that all the parties who executed the deed were bound by it, and he "saw no reason why, there being an agreement, all persons who came in

[1] 9 Sim. 196.

with notice should not be bound by it, each proprietor being manifestly interested in preserving the general uniformity and respectability of the row." It was notice of the plan rather than the covenant that created the equitable obligation which the court enforced in this case.

There is no need to state the subsequent cases in detail. Some of them are referred to in Renals *v.* Cowlishaw,[1] where the result is summed up by Vice-Chancellor Hall as follows: —

"From the cases of Mann *v.* Stephens,[2] Western *v.* MacDermott,[3] and Coles *v.* Sims,[4] it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that the right — that is, the benefit — of the covenant inures to the assign of the first purchaser; in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but where a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into by his vendor with another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase."

This opinion was adopted in the same case in the Court of Appeals,[5] and was approved by the House of Lords in Spicer *v.* Martin.[6]

This statement of the law, deducible from these cases, is true as far as it goes; but it does not explain all the decisions, nor can it be said to be the statement of the principle underlying the cases in which the remedy is given to any purchaser against all the others. It assumes that the plaintiff is the assign of the covenant made by the defendant with his vendor, whereas in fact the plaintiff may have purchased before the covenant was made.

The idea that where there is a building scheme or a general plan the order of the conveyances is of no consequence, was suggested by counsel in Sheppard *v.* Gilmore.[7] Pearson, Q. C., distinguished Western *v.* MacDermott on the ground that the conveyance to the

[1] 9 Ch. Div. 125.
[2] 15 Sim. 377.
[3] L. R. 2 Ch. 72.
[4] 5 De G. M. & G. 1.
[5] 11 Ch. Div. 866 (1878).
[6] 14 App. Cas. 12 (1888).
[7] 57 L. J. N. S. Ch. Div. 6; 57 L. T. 614 (1887).

plaintiff in that case was subsequent to the conveyance to the defendant; and Hastings, Q. C., in reply, said: "The judgment in Western *v.* MacDermott was founded on the existence of a building scheme, and it was so regarded in Keates *v.* Lyon. Where a building scheme is established, the order of conveyance is immaterial." Stirling, J., in deciding the case, said it did not appear in what mode the Lord Chancellor reached his conclusion in Western *v.* MacDermott; and that whether the covenant could be enforced by one purchaser as against another, depended on whether it was made for the benefit of the land or of the vendor; and he held that the plaintiff had failed in his proof on this point.

In Nottingham Patent Brick & Tile Co. *v.* Butler,[1] Wills, J., says: —

"The principle which appears to me to be deducible from the cases is, that where the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit."

See also the recent decision of Mr. Justice Stirling in *In re* The Birmingham and District Land Company and Allday,[2] and the observations of court and counsel in Remington *v.* Everett.[3]

The idea of a general law and of the agreement being made for the common benefit was clearly brought out shortly afterwards in Spicer *v.* Martin in the House of Lords. In that case the plaintiff was a prior lessee; but the suit was brought to prevent the lessor from permitting a subsequent lessee from using the premises in violation of the covenant. There was evidence not only of a covenant with the plaintiff, but also of the existence of a building scheme and of references to similar covenants in other leases. It was held that the transaction showed a general plan for the com-

[1] 15 Q. B. D. 261, at p. 268; affirmed on appeal, 16 Q. B. D. 778.
[2] 27 Notes of Cases, 147. [3] [1892] 1 Ch. 148.

mon benefit of all, that all had an interest in maintaining the restriction, and that the defendant, having invited the public to come in and take a portion of an estate which was bound by one general law, — a law perfectly well understood and for the common benefit, — could not destroy the value of the property by authorizing the use of a part of the estate for a purpose inconsistent with the rule by which he professed to bind the whole. An injunction against using the property for trade was sustained (affirming Martin *v.* Spicer, 34 Ch. D. 1).

In Mackenzie *v.* Childers,[1] trustees offered an estate for sale by auction in plots, according to a plan referred to in a deed which was to be executed by the vendors and each of the purchasers. The deed imposed restrictions on the land sold, and contained a recital that it was intended to be a part of all future contracts that the several purchasers should execute the deed and be bound by the stipulations. It was held that there was to be implied from the whole transaction, and from the express assurance that all sales were to be made upon the same conditions, a covenant that the trustees would not permit the unsold property to be used in a manner inconsistent with the plan, and that the plan having been followed for twenty years, an injunction should issue to restrain the trustees from authorizing any purchaser to build contrary to the building scheme. Renals *v.* Cowlishaw and Spicer *v.* Martin were quoted and approved. The liability of the trustees was based on the existence of a general plan or scheme; and this was declared to be the foundation of the liability of one purchaser to another.

Turning now to American cases, we find a series of decisions in Massachusetts in which a general plan for the common benefit is made the basis of the reciprocal liability. The leading case is Parker *v.* Nightingale.[2] The heirs of an estate, owning several adjoining pieces of land in Boston, laid them out in house-lots around a court, and agreed orally among themselves that they should be used exclusively for dwelling-houses, and accordingly gave deeds containing a condition that no building should be erected except for use as a dwelling-house. It was held that the owner of one lot might maintain a bill in equity against the owner and the tenant of another to prevent the perversion of a dwelling-house into a public eating-house. The court said the owners, having united in a scheme or joint enterprise for the division of the estate into lots on

[1] 43 Ch. Div. 265.

[2] 6 Allen, 341 (1863).

a street laid out by them, and having annexed to the conveyance of each lot a restrictive use similar to that of every other, the legal inference, in the absence of evidence to the contrary, is that the intention was to secure to each estate the benefit of the restrictions; and the effect is to confer on each owner a right in the nature of an easement or servitude in all the lots on the same street, or which were conveyed subject to the same restriction. The earlier case of Whitney *v.* Union Ry. Co.,[1] often cited as authority for the proposition that any purchaser may maintain a bill against any other, was only the ordinary case of a bill filed by the original covenantee against the assigns of the covenantor. In Linzee *v.* Mixer[2] both parties claimed under contemporaneous deeds from the Commonwealth of lots on the Back Bay in Boston, all of which were sold subject to restrictions as to the location of the houses, these restrictions having been publicly advertised as a part of the plan for the improvement of the property. It was held that a bill for injunction would lie. On the other hand, in Dana *v.* Wentworth,[3] it was held that the grantor could not maintain an action against one purchaser for the benefit of others, because there was nothing in the case to show that the restrictions in the deed were a part of a general plan for the benefit of the land conveyed and other estates on the same street. In Tobey *v.* Moore[4] there was evidence tending to show a general scheme of improvement, and Gray, J., said that the deed under which both parties claimed, "by applying the same restrictions to many lots on various streets, supplied the evidence (which was wanting in Dana *v.* Wentworth) of a general scheme for the improvement and benefit of all the lands included in a large tract, which a grantee of any part of the land may enforce against his neighbor." In Beals *v.* Case[5] one purchaser was not allowed to have an injunction against another to enforce the covenant contained in both their deeds that the building should not in any event be used as a stable. It appeared that the grantor had intended to except private stables, and that in other deeds the covenant contained that exception; and the court said one purchaser has a remedy against another, "But it is always a question of the intention of the parties; and, in order to make this rule applicable, it must appear from the terms of the grant or from the surrounding circumstances that it was the intention of the grantor in inserting

[1] 11 Gray, 359 (1858).
[2] 101 Mass. 512.
[3] 111 Mass. 291 (1873).
[4] 130 Mass. 448 (1881).
[5] 138 Mass. 138 (1884).

the restriction to create a servitude or right which should inure to the benefit of the plaintiff's land, and should be annexed to it as an appurtenance." In Payson *v.* Burnham[1] there were mutual covenants between the owners of the Mill-Dam and the adjoining flats in Boston with reference to the location of houses, and the grantee of one party was allowed to maintain a bill against the grantee of another to restrain the erection of a bay window. In Hamlen *v.* Werner[2] it was shown that the restrictions were inserted in pursuance of a general plan for building upon all the lots for the improvement of the neighborhood and for the benefit of all purchasers; and it was held that one who derived title from the vendor after the conveyance under which the defendant claimed might maintain a bill to enforce the covenant contained in the defendant's deed.

In these cases in Massachusetts the general plan, and not the covenant itself, is made the basis of the liability; and yet the court, in some of the cases, at least, considers the obligation as a sort of easement appurtenant to the land, instead of an equitable obligation arising out of the purchase of the property with notice of the purpose to which it has been devoted. The well-known Columbia College cases[3] in New York suggest that relief is granted upon the theory that there is an easement upon the land of a grantee in favor of the land of any other; but in these cases also there is the general plan in an agreement between the owners of two tracts of land to devote their lands to a certain purpose, and to exclude all other uses.

It would take too long to follow down the lines of cases in other States, nor is it worth while in a discussion of this kind, on a subject on which so much has been written, to attempt to refer to the cases in the various States. There is a recent decision in New Jersey in which the question arose whether a prior purchaser could maintain a bill against a later purchaser to restrain the violation of a covenant contained in both their deeds. There was evidence of a general plan or purpose in the laying out of the land and imposing restrictions upon the purchasers.[4]

Vice-Chancellor Green, after reviewing the cases, said:—

"The right of the owner of a lot of land to enforce a covenant restrictive of the use of another tract, which covenant has been entered

[1] 141 Mass. 547 (1886). [2] 144 Mass. 396 (1887).

[3] Trustees of Columbia College *v.* Lynch, 70 N. Y. 440 (1877); Trustees *v.* Thacher, 87 N. Y. 311 (1881).

[4] De Gray *v.* Monmouth Beach Club House Co., 24 Atl. Rep. 388 (1892).

into by an owner of such other tract with the former owner of both, but has not been expressly assigned, depends primarily upon the covenant having been made for the benefit of land embracing said lot. If it has been so made, the benefit of the covenant inures to subsequent purchasers of the land: Coudert *v.* Sayre, Mann *v.* Stephens, Western *v.* MacDermott. [This rule, however, he says,] gives no right of action to a prior against a subsequent purchaser, and some other reason must exist for that class of cases which hold that purchasers and their assigns are entitled to enforce as between themselves a restrictive covenant entered into by first purchasers with a common vendor without reference to priority of title. . . .

"The class of cases in which equity has given such relief embraces those involving restrictive covenants entered into with the original owner or owners of a tract, in pursuance of a general plan for the development and improvement of the property, by laying it out in streets, avenues, and lots, adopting some uniform or settled building scheme, regulating the number, location, size or style of houses, or the uses to which the buildings or property may be put.

"The action is held not to be maintainable between purchasers not parties to the original covenant in cases in which, —

"1. It does not appear that the covenant was entered into to carry out some general scheme or plan for the improvement or development of the property which the act of defendant disregards in some particular. Sheppard *v.* Gilmore, 57 L. J. Rep. N. S. Ch. 6; Dana *v.* Wentworth, 111 Mass. 391; Beals *v.* Case, 138 Mass. 140.

"2. It does not appear that the covenant was entered into for the benefit of the land of which complainant has become the owner. Sharp *v.* Ropes, 110 Mass. 381; Keates *v.* Lyon, L. R. 4 Ch. App. 418; Jewell *v.* Lee, 14 Allen, 145; Renals *v.* Cowlishaw, 11 Ch. D. 866.

"3. It appears that the covenant was not entered into for the benefit of subsequent purchasers, but only for the benefit of the original covenantee and his next of kin. Master *v.* Hansard, 4 Ch. D. 718. See Nottingham Brick Co. *v.* Butler, 15 Q. B. D. 261; Collins *v.* Castle, 36 Ch. D. 243; Renals *v.* Cowlishaw, 9 Ch. D. 125.

"4. It appears that the covenant has not entered into the consideration of the complainant's purchase. Renals *v.* Cowlishaw, 9 Ch. Div. 125, s. c. 11 Ch. Div. 866; Master *v.* Hansard, *supra;* Keates *v.* Lyon, *supra.*

"5. It appears that the original plan has been abandoned without dissent, or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and to thus render its enforcement unreasonable. Duke of Bedford *v.* Trustees, 2 Myl. & K. 552; Sayers *v.* Collyer, 28 Ch. D. 103; Trustees *v.* Thacher, 87 N. Y. 311; Ammerman *v.* Deane, N. Y. Ct. App. 30 N. E. Rep. 741; Page *v.* Murray, 46 N. J. Eq. 325; Roper *v.* Williams, Turn. & R. 18; Peek *v.* Matthews, L. R. 3 Eq. 515. See German *v.* Chapman, 7 Ch. D. 271."

Quoting the cases we have already cited, the Vice-Chancellor says: —

"The law deducible from these principles and the authorities applicable to this case is, that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to, and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan, — one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase.

"The right of action from this would seem to be dependent as much on the fact of the general scheme as on the covenant, — a very important consideration in a case in which the question arises whether certain threatened acts are in violation of the covenant, if any ambiguity exists as to its scope and meaning."

This, we think, will be found to be a true statement of the law relating to this subject, and one which sums up the results to be gathered from the previous cases. It calls attention to the fact that the principle of assignment of covenant is not applicable to prior purchases, and shows that it is only in cases where there is a general plan that the rights and liabilities are conferred upon all purchasers alike. The decision also shows that the right of action is based upon the agreement expressed or implied in the plan rather than upon the covenants in the deeds, and makes the nature and purpose of the scheme important in determining the meaning of the contract.

The idea of a general plan will also throw light upon the question whether when a man has sold a number of lots subject to restrictions he is at liberty to sell others without restrictions, or to use the remainder of the property himself in a manner inconsistent with the restrictions. Supposing the vendor to make no covenant with respect to the land he retains, is he free to use that as he pleases while all the land he sells is subject to restrictions? Have the various purchasers a remedy against one another, and none against the vendor? If the vendor has a right as against previous purchasers to sell a lot free of restrictions, how is it that

if he sell it subject to restrictions the previous purchaser acquires a right to enforce the covenant? And if there is such a right against a purchaser, why not against the vendor? It is not as easy to answer all these questions as to ask them; but it would seem that in the absence of an express contract the obligation of the vendor, as well as that of the purchasers, depends on the existence of a general plan made known to purchasers, and entering into the consideration of the purchases. It is certainly not true that the mere sale of lots subject to restrictions binds the vendor to keep or convey the remaining lots subject to the same restrictions. It may well be that he places the restriction upon the use of land sold for the very purpose of giving to his own lot the exclusive right with respect to that use, — as, for example, the use for the purposes of an hotel, — or it may be that it is intended that only a part of the tract shall be devoted to such uses as make the restrictions desirable. In the absence of a contract, the vendor cannot be held to have bound himself to observe the same restrictions unless it appears that by the adoption of some plan or scheme with reference to the whole tract he has devoted it all to the same purpose, and purchases have been made upon the faith that such purpose would be carried out. It is always a question of fact whether it was the intention of the vendor to make the covenant appurtenant to the land, and give the purchasers a remedy against one another;[1] and if it appears as a fact that the lots were sold pursuant to a plan made known to the purchasers, by which the whole tract was to be subject to the same restrictions, then the vendor will not be at liberty to sell any part of it free of the restrictions. It would seem from the language of the court in the case last cited that unless all the land is put up for sale at once it will require strong proof to subject the remaining land to the restrictions. "If," the court says, "the owner sells all the land, it is evidence of an intention to benefit the purchasers; if he reserves part of it, there may be a question as to that part. If all the lots are put up for sale, it is no matter if they are not sold the first time. There are two lines of cases, — those where there has been only a sale of part of the property; and those where the whole has been put under a building scheme. It is a question of fact, and very material, whether the owner reserves a part for himself."

[1] Spicer *v.* Martin, 14 Ch. App. 12; Nottingham Patent Brick & Tile Co. *v.* Butler, 16 Q. B. D. 778.

If there is a general plan applicable to all the lots, or if the owner by express agreement binds himself not to sell any lots except subject to certain restrictions, then he will be bound by it himself, and the land will be bound by it in the hands of purchasers with notice, whether there be a contract with the purchaser or not. In Talmadge *v.* The East River Bank,[1] in an action against a purchaser who had made no covenant, the court said : —

"Selling and conveying the lots under such circumstances and with such assurances, though verbal, bound Davis (the vendor), in equity and good conscience, to use and dispose of all the remaining lots so that the assurances upon which Maxwell (the plaintiff) and others had bought their lots would be kept or fulfilled. This equity attached to the remaining lots, so that any one taking from Davis any one or more of the remaining lots with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity."

In Lenning *v.* Ocean City Association [2] it was held by the Court of Errors of New Jersey that the sale of lots in a camp-meeting ground with reference to a map showing a central plot which it was understood was to be used for tents, was sufficient to bind the vendors not to lease any part of this plot for the erection of wooden dwelling-houses. The obligation was put upon the ground of an implied covenant arising out of the use of this map under these circumstances. See also Parker *v.* Nightingale,[3] Newmann *v.* Ellis,[4] Duke of Bedford *v.* British Museum.[5] In a recent case in England,[6] where land was put up for sale as building land subject to restrictive building conditions, and the vendors had not sold all the lots, an intending purchaser of one of them asked for a declaration that he was entitled to the benefit of an implied contract by the vendors that they would observe the same conditions as to the unsold lots. Mr. Justice Stirling said the circumstances of the case must be looked at to see whether the covenants were merely for the protection of the vendors, or whether they were intended for the common advantage of the purchasers. Under the circumstances of this case he held that the vendors had invited the people to buy on the footing that one general plan should bind the whole estate;

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[1] 26 N. Y. 105 (1862). [3] 6 Allen, 341. [5] 2 M. & K. 552.
[2] 41 N. J. Eq. 606. [4] 97 N. Y. 285.
[6] *In re* Birmingham and District Land Company and Allday, 27 Notes of Cases, 147.

and he made the declaration asked for. It has been suggested that there are cases of this kind in which the vendor is restrained from using the land in a manner inconsistent with the restrictions, on the principle that a man shall not be allowed to derogate from his own grant; but this principle belongs to the law of easements arising out of the sale of two tenements, and the case of Master *v.* Hansard,[1] in which it was invoked, was a case in which a lessor, who had taken covenants from his lessees of adjoining lots, permitted one of them to erect a building so as to darken the windows of the other; and even in this case the court held that the principle did not apply.

We have not attempted to limit or define the principle on which relief is granted against the violation of restrictive covenants, nor to refer to all the reasons suggested by the courts for granting the relief under various circumstances; but on following several lines of cases, and reading the recent decisions in New Jersey, it seems to be clear that, in order that relief may be granted in favor of any one purchaser against another, there must be something more than the mere covenant of each purchaser with the vendor; and also that it must appear that back of this was some general plan relating to all the lands sold, intended for the common advantage of the purchasers, and entering into the consideration of the purchases. It must also appear that the sales were made with notice of this plan and under an agreement, express or implied, that the plan was to be carried out with respect to the lots sold or to be sold in pursuance of it. Any purchaser of a part of this land with notice of this plan or purpose is subject in equity to the restrictions imposed for the purpose of carrying it out, and has the benefit of the restrictions placed upon others without regard to the order of their conveyances. His right, as well as his duty, springs out of the original plan under which all alike have taken; and there is no need to inquire whether the plaintiff is the assignee of the covenant in the defendant's deed, or whether the covenant runs with the land. The restriction imposed by the original plan affects all purchasers alike; each one consents to it for himself, and has a right to assume that all others have assented to it. It is prior to all the purchases, and becomes a condition upon which the purchases are made. It is a breach of faith to use the land in violation of the restriction, and the Court of Equity will interfere by injunction at the instance

[1] L. R. 4 Ch. Div. 718.

of any person interested to prevent the common purpose from being defeated by any person who has received the benefit of the restriction imposed upon the land for the common advantage.[1] The vendor himself will also be subject to the same equities with respect to any land which, either expressly or by implication, he has agreed shall be used under the same restrictions; and the question in every case is a question of evidence with regard to the intention expressed by the vendors, and the scope and character of the plan as made known to the public and to the purchasers of the lands.[2]

Edward Q. Keasbey.

NEWARK, NEW JERSEY,
October, 1892.

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[1] See the language of Bigelow, C. J., and Beasley, C. J., quoted on pages 281–283 from Whitney *v.* Union Ry. Co., 11 Gray, 359, and Brewer *v.* Marshall, 19 N. J. Eq. 337. See also Spicer *v.* Martin, 16 Q. B. D. 778.

[2] De Gray *v.* Monmouth Beach Club House Co., 24 Atl. Rep. 388; Nottingham Brick & Tile Co. *v.* Butler, 16 Q. B. D. 778–783.